Supreme Court, U.S.
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No. 99-1081

IN THE
# SUPREME COURT OF THE UNITED STATES

TOWN OF MULDROW, et al.,
*Petitioners*,

v.

SEQUOYAH COUNTY RURAL
WATER DISTRICT NO. 7,
*Respondent*.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

## BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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## MOTION TO INTERVENE AS AMICUS CURIAE

COMES NOW The City of Broken Arrow, Oklahoma, The City of Holdenville, Oklahoma, the City of Okmulgee, Oklahoma, the City of Stillwater, Oklahoma, the City of Ponca City, Oklahoma, and the organizations of the National League of Cities and the Oklahoma Municipal League, and request permission to file the attached "RESPONSE SUPPORTING THE PETITION FOR WRIT OF CERTIORARI". The Tenth Circuit Court of Appeals has rendered a decision that interprets a statute, which affects all of the Amici Curiae and has constitutional implications that impact the operations of these and other cities. The two listed organizations are associations, which directly serve cities on the national and state levels, and are concerned that the issues of this case, are certain to reoccur. Unless the issues are fully addressed, the proposed Amici Curiae will have to repeatedly relitigate the identical issues, because the construction of law used by the Tenth Circuit directly addresses Fifth Amendment due process and Tenth Amendment reservation of powers issues which these entities are not prepared to waive.

Although the parties have framed the questions for presentation on appeal, the proposed Amici Curiae believe that they can bring relevant matter to the attention of the Court, which will not be fully addressed by the parties in the absence of the proposed participation. Counsel for Petitioners Town of Muldrow, et al., has consented to the participation by these entities. Counsel for Respondents Sequoyah County Rural Water District No. 7 has acknowledged that this case is drawing national attention, but has further stated that they will refuse to consent to any participation by any Amici Curiae.

WHEREFORE, the above cities and associations request permissions to participate as Amici Curiae in this case.

Respectfully Submitted,

MICHAEL R. VANDERBURG
CITY OF BROKEN ARROW
NATIONAL LEAGUE OF CITIES
OKLAHOMA MUNICIPAL LEAGUE
CITY OF STILLWATER
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BY: /s/_____

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## ARGUMENT FOR GRANTING WRIT

The Court should grant certiorari in this case because 7 U.S.C. § 1926(b), as construed by the Tenth Circuit, substantially exceeds the power of Congress under the Spending Clause, the Tenth Amendment and the Fifth Amendment. There is a need for the Court to retrieve the actual language of Section 1926(b) from a tangled web of deviations and extrapolations, which courts have used as a substitute for the express words of Section 1926(b). This development has led to a split in the circuits.

Section 1926(b) is enacted under the Spending Clause as part of a federal loan program, which was aimed at developing water services in rural areas. The Tenth Circuit has extended the sweep of this statute by regulating the State of Oklahoma as to its policy for its internal development, its empowerment of intra-state water providers, and its enforcement of the powers conferred on its municipalities by Oklahoma's Constitution. OK. Const. Art XVIII, § 6. The Tenth Circuit did this by exposing Cities to liability during periods 1) prior to the existence of a federal loan and 2) after all federal loans have been paid in full. Such an enlargement of federal power exceeds the limits of the Spending Clause, deprives Cities of basic due process of law under the Fifth Amendment, and is at odds with the Tenth Amendment.

The Tenth Circuit's construction of Section 1926(b) is based on a complete deviation from express statutory language, and is grounded on a mistaken understanding of congressional intent as set out in Section 1926(a)(1). The Tenth Circuit, following the lead of the Fifth Circuit, reads into the statute a prohibition of "encroachment," which expands the meaning of Congress' language beyond its intent and beyond constitutional bounds. Although the statute states

that it applies "during the term of such loan," the Tenth Circuit finds "encroachment" from water service the Town provided before the loan originated. The Tenth Circuit continues to find "encroachment" from water service the Town of Muldrow provided after the federal loan was satisfied, and therefore after all federal interest in the situation had ceased. The resulting application of Section 1926(b) is not viable under the Spending Clause, or the Fifth Amendment, or the Tenth Amendment.

Enforcement of Section 1926(b) based on such a construction divests the Town of its vested rights and effects a taking of the Town's water distribution system and revenues without notice and without compensation. This is contrary to the Fifth Amendment. It is also contrary to the specific purposes of the water loan program for developing water services in rural areas. 7 U.S.C. § 1926(a)(1).

## ARGUMENT 1

### The Tenth Circuit's construction of Section 1926(b) pushes the statute beyond the powers of Congress under the Spending Clause and the Tenth Amendment.

During a period when the current borrower did not have a federal loan, the Town of Muldrow extended service to certain areas and customers situated in territory now claimed by the borrower. The borrower (Water District) subsequently initiated an FmHA loan in 1994, without notice to the Town of Muldrow or to the customers of their service. On that basis, the borrower asserts that Section 1926(b) must be applied retroactively to prohibit the Town from continuing its existing service.

Section 1926(b) is an exercise of congressional power under the Spending Clause. U.S. Const. art. 1 § 8, cl. 1. The spending clause does not confer power to regulate. *Hoke v. United States,* 227 U.S. 308, 33 S.Ct. 281, 57 L.Ed. 523 (1913). It merely empowers Congress to spend for purposes delegated to the federal government. *United States v. Butler,* 297 U.S. 1, 56 S.Ct. 312, 80 L.Ed. 477 (1936). Congress may not impose conditions unrelated to those delegated powers. *Steward Mach. Co. v. Davis,* 301 U.S. 548, 57 S.Ct. 883, 81 L.Ed. 1279 (1937).

The federal purpose of Section 1926(b) is to protect the federal government's interest in collateral pledged by borrowers under the loan program established in 7 U.S.C. § 1926. The statute expresses this purpose in clear, unambiguous language:

> Curtailment or limitation of service prohibited. The service provided or made available through any such association shall not be curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise for similar service within such area during the term of such loan; nor shall the happening of any such event be the basis of requiring such association to secure any franchise, license, or permit as a condition to continuing to serve the area served by the association at the time of the occurrence of such event. (Emphasis added.)

This restriction is a condition attached to loans made by the federal government through the Farmers' Home

Administration (now renamed as the Rural Utilities Service). *Glenpool Utility Services Authority v. Creek County Rural Water District No. 2,* 861 P.2d 1211 (10th Cir. 1988). The purpose of the loan program is to fund water extension into rural areas that otherwise would not have access to a public water supply system. 7 U.S.C. § 1926(a)(1). Thus, Congress has provided funding for services traditionally within the ambit of State policy-making. Congress did not expressly authorize the transfer of existing water customers from one provider to the new borrower. Such a borrower's legal existence, authority to engage in water service and right to a service territory derives solely from State law.

The federal loan is intended to build infrastructure for the primary benefit of rural residents 7 U.S.C. §1926(a). Facilities funded by the loan and revenues produced by operation of the facilities are pledged as collateral for the loan. *Scioto County Regional Water Dist. No. 1 v. Scioto Water, Inc.,* 103 F.3d 38, 42 (6th Cir. 1996), *cert. denied, 521 U.S. 1111* (1997).

The sole purpose of §1926(b) is to protect the federal lender's interest in the collateral during the life of the loan. *Id. See also, Lexington-South Elkhorn Water Dist. v. City of Wilmore,* 93 F.3d 230, 234 (6th Cir. 1996). It does so by preventing municipalities from using their governmental powers of regulation, licensing or franchising to interfere with the viability of the collateral within their boundaries. *City of Madison, Miss. v. Bear Creek Water Association, Inc.,* 816 F. 2d 1057, 1059 (5th Cir. 1987). In order for Congress to restrict public bodies created by the State from exercising certain of their governmental powers, such restrictions must be closely tied to the federal purpose of protecting collateral pledged to the federal loan. *Bell Arthur Water Corporation*

*v. Greenville Utilities Commission*, 972 F.Supp. 951 (E.D. N.C. 1997).

The Tenth Circuit holds that, when a borrower acquires a loan protected by Section 1926(b), the Town is prevented from continuing to serve customers, which it legally acquired when no federal loan – and so, no collateral – existed. Further, this prohibition is imposed without notice or opportunity to the Town to defend its property or services. Also no notice is provided to the customers. The Tenth Circuit thus transforms Section 1926(b) into a peremptory designation of service territory. By protecting borrowers against preexisting water providers, the Tenth Circuit also reconfigures the statute into a peremptory designation of service providers.

If the Town provided water service under authority of State law at a time when there was no federal indebtedness to trigger Section 1926(b), there is no federal purpose to apply Section 1926(b) to shield a subsequent loan from competing water suppliers. Where rural areas already enjoy adequate, affordable water service from the Town prior to the borrower's loan, those areas are not included in the class for which the federal loan program was created; therefore, as applied to them, there is no federal purpose for the exercise of power under the Spending Clause. The Tenth Circuit's use of Section 1926(b) to oust the Town's preexisting service inserts it into the sphere of powers reserved by the States under the Tenth Amendment.

The Oklahoma Constitution empowers the Town to extend water service throughout its corporate limits. OK. Const. art XVIII, § 6. State law confers on the Town authority to serve outside its boundaries at its discretion. 11 O.S. §§ 22-104 and 37-102. The State's policy regarding

water service is integrally tied to its broader plans for economic development, land use, managed growth, citizen empowerment and quality of life issues. Water availability affects the effectiveness and efficiency of many governmental policies: fire protection, sewer and wastewater treatment, water resource development and environmental protection, to name a few. Cities and Towns are local units of general government, whereas Water Districts have very limited powers and cannot provide the range of services as are provided by municipalities. The State must be concerned that services are delivered uniformly and without wasteful duplication of expenditures for infrastructure, particularly in urban or urbanizing areas. State policy on many utility issues is established directly by the State Constitution itself.

The Tenth Circuit has converted Section 1926(b) into a regulatory statute in derogation of this State power. Under the Tenth Circuit's holding, Section 1926(b) is not limited to protecting federal loan collateral but is expanded to protect the borrower itself. Shielding the borrower beyond the protection of its collateral inserts the federal government into State affairs. The Tenth Amendment bars such regulation of the States. There is no federal power to protect the borrower (who is a creature of the State) from the dictates of State law in the absence of a federal spending purpose. U.S. CONST., amend. X.

It is noteworthy that the statute on its face does not purport to protect the borrower. "The purpose of Section 1926(b) is not to protect a rural water association at all costs . . ." *Rural Water System No. 1 v. City of Sioux Center*, 967 F.Supp. 1483, 1520 (N.D. Iowa 1997). In fact, it only protects the federal government by securing the potential of the funded facilities to repay the loan. There is no federal purpose in disrupting State-authorized water service to

existing customers in order to loan money to a different provider to build a duplicative system to serve those same customers. Such creation of service rights and territory is a State regulatory matter. Further, there is no federal purpose in disrupting State-authorized water service at a time when no federal loan exists. The statutory language "during the term of the loan" becomes meaningless under the Tenth Circuit's interpretation that the statute protects a borrower before the loan existed and after the loan has been repaid.

This Court should grant certiorari in order to return the construction of Section 1926(b) to the purposes permitted by the Spending Clause. There is a need for the Court to address the restricted uses of Section 1926(b) under the Tenth Amendment.

## ARGUMENT 2

**Section 1926(b) must be construed within the bounds of its express statutory language and must advance the federal purpose of Section 1926(a) under the facts and circumstances of each case.**

When Respondent obtained its loan from Farmers Home Administration in 1994, it did not have an exclusive service territory under State law. *Comanche County Rural Water District No. 1 v. City of Lawton,* 501 P.2d 490 (Okla. 1972). Respondent now claims that Section 1926(b) gives it an exclusive right to provide water service within its area. It further asserts a right to relief from any activity of the Town to selling or continuing to sell water within the area. These claims are not supported by the plain language of the statute.

Section 1926(b) is merely a loan condition, for so it must be characterized under the Spending Clause. Unfortunately, the extant case law broadens the sweep of the statute without regard to the actual words used. Thus it is said variously that Section 1926(b) is "intended to protect rural water districts from competition . . ."; "to assist in protecting the territory served by such an association facility against competitive facilities . . ."; "to protect FmHA-indebted rural water associations from municipal encroachments." "The service area of a federally indebted water association is sacrosanct." See discussion and citations at Appendix A, pp. 8a-9a.

These judicial statements belie a too-narrow view of the world of water service, which is not supported by the federal program itself. Of course, rural water associations are not the sole intended beneficiaries of Section 1926(b) because municipalities are also eligible borrowers under Section 1926(a)(1). More to the point, the statute does not forbid all competition. A private water company may engage in the business of selling water in the debtor's territory, if state law does not require a franchise. A municipality may sell water in the debtor's service area, if it is authorized by State law to extend water operations outside its boundaries. Section 1926(b) as written does not in fact make the federal debtor's service area sacrosanct.

Section 1926(b) merely prohibits the use of governmental power to put the borrower at a competitive disadvantage. The forbidden actions are all regulatory powers uniquely belonging to government: restricting debtor's ability to serve as the result of annexation; granting a franchise; subjecting the debtor to local government regulation through franchise, license or permit requirements. Section 1926(b) as written does not curtail the authority of municipalities and other public bodies to simply compete with

the debtor as a water provider in the same manner as a private water company. Section 1926(b) as written does not prohibit business "encroachment" (competition) by public bodies, merely their use of governmental powers to prevent the debtor from doing business within its service area.

Section 1926(b) does not protect territory. It only protects service that the debtor has already "provided or made available." The statute uses the past tense. It estops the use of governmental power to curtail or limit service from facilities that have already been built. Section 1926(b) does not guarantee federal borrowers that other water providers will be barred from serving rural areas under all circumstances.

In addition, when a FmHA borrower cannot provide facilities to serve an area within a reasonable time, a municipality may extend its service to the area. *Lexington-South Elkhorn Water Dist. v. City of Wilmore, supra* at page 234. If a borrower has failed to bring its facilities within a reasonable distance of a rural area prior to the time that another provider extends its service, the borrower cannot claim Section 1926(b) protection. *Id.*, at page 237.

The Spending Clause requires these results. The constitutional justification for subjecting the Town to Section 1926(b)'s imposition of federal power must be found in: (1) Section 1926(a)'s purpose to provide water service in rural areas; and (2) the separate purpose of Section 1926(b) to protect the collateral for the FmHA loan. *United States v. Butler, supra*. It is alleged that: (1) Respondent does not have facilities within a reasonable distance of some of the disputed customers; and (2) Respondent's facilities are not adequate to deliver the quantity or pressure of water required by some of them.

The federal purpose of bringing water service to rural areas is thwarted if water is not in fact delivered in real time and in sufficient quantities to actually meet the water needs of an area not previously served. The loan program exists to provide for, *inter alia,* " . . . the conservation, development, use, and control of water . . . *and essential community facilities* . . . all primarily serving farmers, ranchers, farm tenants, farm laborers, rural businesses, and other rural residents . . . " (Emphasis added) 7 U.S.C. § 1926(a)(1).

A primary need for rural water use is adequate facilities to produce sufficient pressure for fire protection. Yet, the Tenth Circuit includes a footnote "for remand purposes" that some courts have found that fire protection is not a purpose of Section 1926(b). [Appendix A, p. 26a, fn. 10.] This begs the question. Use of water to serve rural residents is a purpose of Section 1926(a)(1). In reality, insurance companies will not insure rural property, including farmers' or ranchers' homes or rural businesses, if the rural area does not have adequate water pressure for fire protection. Those same farmers, ranchers or rural businesses cannot obtain mortgages if they cannot secure insurance.

The purpose of the federal loan program is to encourage the development of rural areas. In some circumstances, commercial and industrial properties will try to develop in these areas. Due to the congregation of people in the commercial areas and due to the presence of industrial chemicals or flammable materials used in industrial processes, fire protection becomes critical. The use and availability of water facilities for fire protection is, therefore, a purpose of Section 1926(a), which funds all "essential community facilities." The statutory language "provided or made available" requires tangible results for the rural resident. If Respondent failed to provide such results before the Town

made its capital investment to fill the void, then it had not "provided or made available" any service protected by Section 1926(b). *CSL Utilities Inc., v. Jennings Water, Inc.*, 16 F3d 130 (7th Cir. 1993) *cert. denied,* 513 U.S. 812 (1994).

The Section 1926(b) protections cannot be used to "totally freeze water utility development within the indebted association's service area." *CSL Utilities, Inc. v. Jennings Water, Inc., supra.* Federal power to protect its debtors depends on the federal purpose of protecting its collateral. Where the borrower has failed to provide water service in its territory, there is no collateral. Therefore, there is no federal purpose. *Bell Arthur Water Corporation v. Greenville Utilities Commission, supra.* The federal purpose having dropped away, there can be no proper exercise of the spending power as applied to the facts of this case. The Tenth Circuit places Section 1926(b) at odds with the Spending Clause.

The Court should grant certiorari to provide the proper construction of the express language of Section 1926(b) and to clarify that its protections are dependent on actual use of the federal funds for the federal purposes. There is a need for the Court to clarify that the loan purposes set out in Section 1926(a)(1) define the scope of services, which must be considered in determining whether service is provided or made available to rural communities.

## ARGUMENT 3

**The purpose served by any enforcement of Section 1926(b) protections must fall within the ambit of federal power.**

By viewing territory – exclusive service territory – as the purpose of Section 1926(b), the Tenth Circuit moves the statute beyond the pale of the Spending Clause. The Tenth Circuit subjects the Town to divestiture of its water service by the mere fact that Respondent received a Farmers Home Administration loan years after the Town began its service. Such divestiture is done to the Town without notice and a meaningful opportunity to defend.

Respondent's existing Section 1926 loan was undertaken on September 28, 1994. It had not had a loan since May 5, 1989. In this hiatus, the Town annexed areas and lawfully extended water service under the authority of State law to customers situated within Respondent's territory. There were no competition protections in place because the Respondent was not indebted to the federal government.

On that basis, the Town made a capital investment and exercised its rights under State law to extend water service both within and without its boundaries. Muldrow has a population of nearly 2900. It is small enough to qualify as a borrower under Section 1926(a). Municipalities like Muldrow commonly depend on their infrastructure investment to further both governmental and proprietary policies. Especially for small communities with a small tax base, loss of infrastructure investment is not easily absorbed.

The Tenth Circuit now finds that Section 1926(b) can retroactively force the Town to forfeit the value of its

investment. The Tenth Circuit decision does not even provide for compensation for the Town's capital investment. Even when there is no federal loan to trigger Section 1926(b), the Tenth Circuit insists that a legitimate municipal activity is an "encroachment". A subsequent loan somehow retroactively converts the otherwise legitimate activity into an actionable invasion of the borrower's territory.

> In addition, although Plaintiff [Respondent] cannot seek relief for *encroachments* occurring between May 5, 1989, and September 28, 1994, *because it was not indebted to the FmHA during that period,* we must still examine whether Plaintiff has established genuine issues of material fact concerning whether it made service available to the customers which Defendants [the Town] began serving during that period. We undertake this inquiry for purposes of determining whether Plaintiff may seek relief for *encroachments* that continued beyond the date of the 1994 loan. (Emphasis added) [Appendix A, at p. 19a-20a.]

Thus, the Tenth Circuit applies Section 1926(b) to take existing customers away from the Town and reserve them to the Respondent even though: (1) the Town is currently serving customers in the area under authority of state law; (2) Respondent has never served them; (3) at the time the Town initiated service, Respondent had no federal loan or other basis for an exclusive claim to serve them; (4) the individual customers will be forced to switch from their existing service to Respondent's facilities and bear the cost of making Respondent's duplicate service available; and (5) Respondent has no duty to serve these customers.

This result is not viable under the Spending Clause. Where the federal spending purpose is to obtain water service for rural areas, those areas already receiving service fall outside the class that the federal loan program intends to aid. On the other hand, if a loan recipient has failed to make service available, the federal purpose is advanced if another water provider extends service to the area. The area will not be served at all if that alternate provider will be divested of its investment by a subsequent loan.

The federal goal of 1926(b) is water service for rural residents and businesses, thereby creating rural economic development. If this Tenth Circuit retroactive standard is allowed to stand, rural development as happened surrounding the small town of Muldrow will not take place. In reality, no responsible public water provider will make an investment that is subject to forfeiture by federal law.

Where water service is already available to a rural area, there is no reasonable purpose under Section 1926 to loan federal money to some other entity to provide the same or perhaps a lesser service. At a minimum, the entity providing existing service should have notice and a reasonable opportunity to defend, prior to the federal agency using a loan closing to divest the Town of its property and its customers. Certainly, it is not reasonable to require customers already receiving water service to pay the capitol costs for a new provider to make a duplicative service available to them. For that reason, there is no federal interest in including them as collateral for a loan. *Rural Water System No. 1 v. City of Sioux Center*, supra.

Indeed, the protections of Section 1926(b) exist only "during the term of such loan." Absent those federal restrictions, a municipality has authority under State law to

provide water service within and without its boundaries. Ok. Const. art. 18 § 6; 11 O.S.1991 §§22-104 and 37-102. In this case, the rural residents already have adequate service from the Town. It is obvious that pre-existing municipal water service to territory assigned by state law, does not occur during the life of the loan, when an entity becomes a FmHA borrower. The Town's existing customers, who were served by a municipal water system at the time of the loan, could not properly have been considered as part of the loan collateral.

Under the facts of this case, the Town's continued service does not impair any legitimate loan collateral. The legal viability of Section 1926(b) depends on the federal interest. *Scioto County Regional Water Dist. No. 1 v. Scioto Water, Inc., supra.* Where the federal interest in the loan collateral is not involved, Section 1926(b) cannot constitutionally apply. To apply it as the Tenth Circuit does, without a federal interest, exceed the limitations of the Spending Clause.

The Tenth Circuit attempts to avoid this result by transforming Section 1926(b) into an exclusive assignment of territory by the federal government. Under this view, the statute ousts the Town from Respondent's service areas even though the Town already provides those areas with adequate and affordable water service. The only result accomplished by applying Section 1926(b) in this case is to wastefully substitute water providers, through the duplication of the infrastructure.

If Section 1926(b) is wielded to cut off the Town's continuing service to the disputed areas, it becomes a mechanism for federally created extortion. Unless the Town buys back from the Respondent the right to serve its own

customers, federal law retroactively divests the Town of an existing revenue stream and the benefit of its capital investment in its water system. A remedy actually proposed in this case would have compelled the transfer of ownership of the Town's preexisting water lines to the Respondent, in order to give Respondent the ability to take over the service the Town currently provides!

Prohibiting the Town from continuing its water operations deprives it of the value of its publicly financed system. To oust a legitimate water service system from areas it already serves in favor of an alternate system is confiscatory. This is an appropriation of Muldrow's property without "just compensation." U.S. Const. amend. V. The protections of the Fifth Amendment extend to States and their subdivisions. See *United States v. Carmack,* 329 U.S. 230, 242 (1946), *reh'g denied,* 329 U.S. 834 (1947). Therefore, there is no federal power to impose loan conditions in the manner attributed to Section 1926(b), and the Tenth Circuit's statutory construction is in violation of the federal constitution.

Because enforcement of Section 1926(b) against the Town does not advance the purpose of the federal program under these facts and circumstances, it is not a valid exercise of federal power as applied to this case. The Court should grant certiorari to establish that Section 1926(b) cannot be applied to oust a public water provider legally serving the area prior to the date of the federal loan.

## CONCLUSION

Your Amici Curiae respectfully request the Court to grant certiorari to return judicial application of 7 U.S.C.

Section 1926(b) to the ambit of congressional power under the Spending Clause. By correcting the self-perpetuating interpretive errors and by conforming the statute to the Tenth Amendment, this Court will preserve the constitutional balance required by federalism. By requiring compliance with the Fifth Amendment, this Court will restore due process.

Respectfully Submitted,

CITY OF BROKEN ARROW
OKLAHOMA MUNICIPAL LEAGUE

/s/_____
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## APPENDIX 1

**IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA**

[Filed June 12, 1998]

No. 97-578-S

| | |
|---|---|
| SEQUOYAH COUNTY RURAL WATER DISTRICT NO. 7, an agency and legally constituted authority of the STATE OF OKLAHOMA, *Plaintiff*, | ) |
| v. | ) |
| TOWN OF MULDROW, an Oklahoma town and the MULDROW PUBLIC WORKS AUTHORITY, a public trust, *Defendants*. | ) |

**ORDER**

The following motions are before the court for its consideration: (1) Plaintiff Sequoyah County Rural Water District 7's motion for partial summary judgment, (2) Defendant Town of Muldrow's motion for partial summary judgment, and (3) Defendant Town of Muldrow's motion to dismiss state law claims. Plaintiff Sequoyah County Rural

Water District No. 7 ("Sequoyah-7") filed this action against Defendants Town of Muldrow and Muldrow Public Works Authority (collectively referred to as "Muldrow") seeking to enforce the provisions of 7 U.S.C. § 1926(b), which allows federally indebted rural water associations to service their territories free from the competition of municipalities. Sequoyah-7 claims Muldrow has violated § 1926(b) by selling water within Sequoyah-7's territory. Sequoyah-7 seeks to enforce the provisions of § 1926(b) by invoking the enforcement provisions of 42 U.S.C. § 1983 and the Declaratory Judgment Act, 28 U.S.C. § 2201(a) and 2202. Sequoyah-7 seeks declaratory and injunctive relief, as well as damages for Muldrow's past sales of water. The parties have fully briefed the issues necessary for the resolution of § 1926(b) liability.[1] Based on the foregoing reasons, the court finds the issues in favor of Muldrow and grants its motion for partial summary judgment. Sequoyah-7's motion for partial summary judgment is denied.[2]

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[1] This parties have submitted this matter for resolution on their respective briefs. At the pretrial conference, it was agreed that a trial on the issue of damages would be necessary only if the court held in favor of Sequoyah-7 on its § 1926(b) claims.

[2] Muldrow's motion to dismiss Sequoyah-7's state law claims is moot. In its motion to dismiss, Muldrow sought the dismissal of Counts 6, 7, and 8. By stipulation of dismissal dated February 23, 1998, the parties dismissed without prejudice Counts 4, 5, 6, and 7. Thus, the only remaining Count related to Muldrow's motion to dismiss is Count 8 - a request that the court declare all water lines and facilities constructed by Muldrow to serve residents within Sequoyah-7's territory be held in trust for the use and benefit of Sequoyah-7. Given the court's rejection of Sequoyah-7's legal arguments for a § 1926(b) violation, the attendant claim in Count

**BACKGROUND**

Sequoyah-7 is an agency and legally constituted authority of the State of Oklahoma created for the purpose of developing and providing an adequate water supply to serve and meet the needs of rural residents within Sequoyah-7's territory. Muldrow owns and operates a water production plant and water distribution system within the Town of Muldrow. In March 1991, Sequoyah-7 was established as a public nonprofit rural water district. The history of Sequoyah-7, however, can be traced back to October 18, 1966, when the Board of County Commissioners of Sequoyah County, Oklahoma, declared certain lands to be incorporated and organized as Rural Water District No. 4, Sequoyah County, Oklahoma ("Sequoyah-4"). The area incorporated into Sequoyah-4 in 1966 included the areas which are now in dispute in the present controversy between Sequoyah-7 and Muldrow. In 1969, all assets and liabilities of Sequoyah-4 were assigned to the Rural Water Corporation ("RWC") and Sequoyah-4 was dissolved. RWC was formed as a nonprofit corporation, in part, to provide a waterworks and distribution for the and benefit of its rural system use water consumers. In March 1991, Sequoyah-7 was created and all assets and liabilities of RWC were transferred to Sequoyah-7.

Shortly after it was created in 1969, RWC began to borrow funds from the FmHA to construct certain water system facilities. RWC would eventually become obligated

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8 for a constructive trust has no merit. Thus, the court's ruling in favor of Muldrow on the motion for partial summary judgment related to the § 1926(b) claims likewise resolves Count 8 in favor of Muldrow.

to the Farmers Home Administration ("FmHA") on three notes - an April 14, 1969, note for $384,000, a June 9, 1970, note for $45,500, and a July 15, 1981, note for $388,000. In May 1989, RWC participated in a program enacted under the Agricultural Credit Act of 1987 whereby bond issuers such as RWC could buy back their government debt at a discounted rate. As a result, RWC borrowed funds from the National Bank for Cooperatives ("NBC") and purchased or paid off its outstanding indebtedness to the FmHA on May 5, 1989. All promissory notes to the FmHA were marked "SATISFIED IN FULL - FmHA." As part of the conversion process, RWC transferred to Sequoyah-7 its obligations to NBC. Sequoyah-7 remains indebted to NBC on the notes issued in favor of NBC. On September 28, 1994, Sequoyah-7 borrowed $331,400 from the FmHA to fund the construction of the "Redline" project and pump station. Sequoyah-7 remains indebted to the FmHA on the September 28, 1994, loan.

During the period of time RWC remained indebted to the FmHA April 14, 1969, to May 5, 1989 - Muldrow began selling water to customers within the territory claimed by Sequoyah-7 as its service area. Muldrow began selling to customers within the Gunter Ridge Addition and to The Gold Crown Motel f/k/a Diana Motel during this time period. After RWC paid off its loans on May 5, 1989, but before Sequoyah-7 became indebted to the Fm/HA on September 28, 1994, Muldrow began providing water service to the following customers claimed to be within Sequoyah-7's service area:

Cherokee Rock Addition

Lot 2, Diana Click location number 293684/293733

Lot 13, Michael Schroeder, location number 293667

Lot 14, Kevin Hauger, location number 293678

FWCC Trucking location number 820138

J.D. Hill, location number 820127

Laster Realty Co., location number 839861

Rasamy Mangboupha, location number 820149

Doug Harvell, location number 820182

After Sequoyah-7 became indebted to the FmHA on September 28, 1994, Muldrow added the following customers claimed to be within Sequoyah-7's service area:

Cherokee Rock Phase I

Lot 1, Robert Powell
Lot 3, Twila McElhaney
Lot 4, Denny Sossemen
Lot 5, Gary Carmen
Lot 6, Clinton Rice
Lot 7, Denise & Lee Boyers

Lot 8, Henry Davis
Lot 9, Dane Leathem
Lot 10, Anthony Bowers
Lot 11, Donna Marion
Lot 12, Dennis Shryrock

Food Plus/Dollar General Store, location number 816937

Bob Prewitt Property (John Bogner), location number 817806

FWCC Trucking office, location number 819929

OK Industries (a/k/a OK Foods), location number 816893

J.D. Hill Truckwash, location number 820166

With respect to all of these customers, it is Sequoyah-7's position that Muldrow has violated § 1926(b) because it has sold water within Sequoyah-7's established territory.

**DISCUSSION**

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); see also Anderson v. Liberty Lobby, Inc., 477 U.S.

242, 247-48 (1986). The moving party has the initial burden of demonstrating the absence of a genuine issue of fact. Celotex v. Catrett, 477 U.S. 317, 325 (1986). If this initial burden is satisfied, the nonmoving party then has the burden of coming forward with specific facts showing that there is a genuine issue for trial as to elements essential to the non-moving party's case. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986); Bacchus Indus., Inc. v. Arvin Indus., Inc., 939 F.2d 887, 891 (10th Cir. 1991). The nonmoving party cannot rest on the mere allegations of the pleadings, but must go beyond the pleadings and "set forth specific facts showing that there is a genuine issue for trial as to those dispositive matters for which [it] carries the burden of proof." Applied Genetics v. First Affiliated Securities, 912 F.2d 1238, 1241 (10th Cir. 1990).

"A fact is 'material' only if it 'might affect the outcome of the suit under the governing law,' and a dispute about a material fact is 'genuine' only 'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" Thomas v. IBM, 48 F.3d 478, 486 (10th Cir. 1995) (quoting Anderson, 477 U.S. at 248). In this regard, the court examines the factual record and reasonable inferences therefrom in the light most favorable to the nonmoving party. Deepwater Invs. Ltd. v. Jackson Hole Ski Corp., 938 F.2d 1105, 1110 (10th Cir. 1991). This court's function is not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Anderson, 477 U.S. at 249. With these standards in mind, the court turns to the merits of parties' motions.

The central issue in this case is whether Muldrow has violated the statutory protections afforded Sequoyah-7 under

§ 1926(b) by selling water to consumers within Sequoyah-7's alleged territory.[3] Section 1926(b) is part of the Consolidated Farm and Rural Development Act, 7 U.S.C. § 1921 *et seq.* ("the Act"). The Act authorizes the Secretary of Agriculture to make or insure loans to associations for a variety of reasons, including the "conservation, development, use, and control of water." 7 U.S.C. § 1926(a) (1). Section 1926(b) of the Act provides in pertinent part:

> [t]he service provided or made available through any such association shall not be curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body, or by the granting of any

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[3] As a preliminary matter, the court's jurisdiction over this controversy must be addressed. The language of § 1926(b) does not contain an enforcement mechanism. Nor does § 1926(b) contain language creating a private right of action. Courts which have addressed § 1926(b) claims have, however, permitted suits to be brought pursuant to the authority of 42 U.S.C. § 1983 for enforcement of § 1926(b) rights. Wayne v. Village of Sebring, 36 F.3d 517, 528-29 (6th Cir. 1994), cert. denied, 514 U.S. 1127 (1995); Rural Water System #1 v. City of Sioux Center, 967 F.Supp. 1483, 1503-05 (N.D. Iowa 1997). Thus, § 1983 is the procedural mechanism allowing Sequoyah-7 to enforce federally protected rights created under § 1926(b). City of Sioux Center, 967 F.Supp. at 1503-05. Moreover, the Declaratory Judgment Act, 28 U.S.C. §§ 2201(a) and 2202, provides an alternative enforcement vehicle for rural water districts seeking relief under § 1926(b). Id. at 1506-07; Lexington-South Elkhorn .Water Dist. v. City of Wilmore, 93 F.3d 230, 232 (6th Cir. 1996).

> private franchise for similar service within such area during the term of such loan. . . .

Sequoyah-7 claims to be an association entitled to the protections of § 1926(b) and, further, that Muldrow's actions of annexing certain areas and providing service to consumers within those areas are violations of § 1926(b) entitling it to relief.

Section 1926(b) is understood as "unambiguously prohibit[ing] any curtailment or limitation of a FmHA-indebted water association's services resulting from municipal annexation or inclusion." City of Madison v. Bear Creek Water Assoc., 816 F.2d 1057, 1060 (5th Cir. 1987). Thus, § 1926(b) operates a means to "encourage rural water development by expanding the number of potential users and to safeguard the financial viability of rural associations and Farmers Home Administration loans." Lexington South Elkhorn, 93 F.3d at 233. The language of § 1926(b) "indicates a congressional mandate that local governments not encroach upon the services provided by such associations, be that encroachment in the form of competing franchises, new or additional permit requirements, or similar means." Bear Creek Water Assoc., Inc., 816 F.2d at 1059.

In order for Sequoyah-7 to establish its entitlement to the protections afforded under § 1926(b), it must prove the following elements: (1) it is an "association" within the meaning of the Act; (2) it has a continuing indebtedness to the FmHA; and (3) Muldrow has encroached upon or invaded an area to which Sequoyah-7 has "made service available." Lexington-South Elkhorn, 93 F.3d at 234; Bell Arthur Water v. Greenville Utilities Com'n, 972 F.Supp. 951, 959 (E.D.

N.C. 1997). With respect to the first element, Muldrow does not contest Sequoyah-7's status as an "association." As a public nonprofit rural water district created for the purpose of developing and providing an adequate rural water supply, Sequoyah-7 clearly qualifies as an "association" under the Act.

Sequoyah-7 must next establish a continuing indebtedness to the FmHA. In assessing the extent of such indebtedness, Muldrow attempts to restrict Sequoyah-7's attachment to a debt obligation to the September 28, 1994, loan from the FmHA. Muldrow contends Sequoyah-7 cannot avail itself of any loan with the FmHA which predated Sequoyah-7's formation in March 1991. According to Muldrow, the 1969, 1970, and 1981 debt obligations between RWC and the FmHA are not to be considered when determining the extent of the continuing obligation between Sequoyah-7 and the FmHA. The court rejects Muldrow's argument. A review of the materials before the court reveals that Sequoyah-7 is a continuation of Sequoyah-4 and its successor, RWC. All three entities were established for the same purpose - to develop and provide an adequate rural water supply for residents of Sequoyah County, Oklahoma. Upon the formation of Sequoyah-7, all assets and liabilities of RWC became the assets and liabilities of Sequoyah-7. 82 O.S. § 1324.33. The statutes under which Sequoyah-7 was created specifically provide that corporations such as RWC, which were formed prior to December 1, 1988, "may organize and constitute a district subject to the provisions of the Rural Water, Sewer, Gas and Solid Waste Management Districts Act." 82 O.S. § 1324.31. The court concludes Sequoyah-7 is a continuation of the corporate entity RWC; therefore, Sequoyah-7 is entitled, for purposes of § 1926(b)

protection, to avail itself of the loans RWC made with the FmHA beginning in 1969.[4]

It is undisputed, however, that RWC's loans with the FmHA were paid off in 1989. As part of a Congressional effort to reduce the deficit, the Omnibus Budget Reconciliation Act of 1986 required the FmHA to sell some of its bonds and other obligations. Scioto County Regional Water Dist. No. 1 v. Scioto Water, Inc., 103 F.3d 38, 40 (6th Cir. 1996), cert. denied, 117 S.Ct. 2497 (1997). Under the Agriculture Credit Act of 1987, the Secretary of Agriculture was required to offer bond issuers such as RWC the option of buying back the debt obligations before the Secretary offered them to third parties. Id. On May 5, 1989, RWC took advantage of this buy out program and extinguished its debt to the FmHA by paying off its obligation at a discounted rate and refinancing through a loan with NBC. With respect to this buy out, Sequoyah-7's financial statements reflect that "[i]n 1989, these loans with outstanding balances of $655,766 were paid off in the discounted amount of $377,931, and were refinanced by a loan in the amount of $320,000 with National Bank for Cooperatives." The promissory notes to the FmHA were marked "SATISFIED IN FULL - FmHA" and the debt was no longer carried in the financial records of either RWC or Sequoyah-7.

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[4] Given this finding, the court need not address Muldrow's argument that Sequoyah-7 does not have § 1926(b) protection as a result of its September 28, 1994, loan because that loan was specifically directed to another project and it did not cover the areas in dispute. See Bell Arthur, 972 F.Supp. at 959-61.

Since the federal indebtedness was paid off on May 5, 1989, Muldrow contends the protections afforded under § 1926(b) were extinguished on that date inasmuch as the necessary element of a federal indebtedness is lacking. Sequoyah-7 objects to Muldrow's characterization of the May 5, 1989, buy out program and contends the notes were "sold" as opposed to "discharged" by the discounted pay out and refinancing. Sequoyah-7 contends this distinction is significant because a provision of the Agricultural Credit Act of 1987 (known as "subsection (g)") states that the curtailment prohibition of § 1926(b) "shall be applicable to all notes or other obligations sold or intended to be sold under this section." By arguing that it "purchased" the notes from the FmHA, Sequoyah-7 seeks to secure the benefit of the coverage provided by subsection (g) and retain its § 1926(b) protections.

The court rejects Sequoyah-7's argument. Subsection (g) has no application to an issuer such as RWC who cancels its debt to the FmHA and refinances the debt through another entity. Subsection (g) is intended for those situations where the FmHA sells a note or debt obligation to a third party. Under this later scenario, the protections of § 1926(b) should "follow the note" as the debt has not been extinguished, but rather, merely transferred to a third party via a sale by the FmHA. When the federal debt is extinguished by the issuer, however, there is no need to extend such protections. The rationale for this distinction has been stated as follows:

> When an issuer buys back its own bond and cancels the debt, however, it no longer qualifies as a debtor for § 1926(b) protection. This statutory interpretation is also faithful to

> one of the main legislative purposes in enacting § 1926(b) - safeguarding Farmers Home Administration loans. Although the government maintains an interest in providing affordable rural water service, its interest in protecting against competition diminishes as its loans are repaid.

Scioto Water, Inc., 103 F.3d at 42. Moreover, the fact that issuers receive a substantial money-saving incentive when paying off their debt to the FmHA supports the existence of a rational basis for extending protection only to obligations sold to third parties, and not to obligations purchased by debtors through the buy out program. Bell Arthur, 972 F.Supp. at 959. Thus, when RWC, Sequoyah-7's predecessor, took advantage of the FmHA buy out program and paid off its debt to the FmHA on May 5, 1989, the protections enjoyed by RWC under § 1926(b) were extinguished and no action taken by Muldrow prior to that time is actionable. See Scioto Water, Inc., 103 F.3d at 40-42; Bell Arthur, 972 F.Supp. at 957-59; City of Sioux Center, 967 F.Supp. at 1523.

The court must next address the protections available to Sequoyah-7 following the May 5, 1989, buy out. It is undisputed that neither RWC nor Sequoyah-7 became indebted to the FmHA between May 5, 1989, and September 28, 1994. Consequently, there is no § 1926(b) protection available to Sequoyah-7 during this time period as no federal indebtedness existed. On September 28, 1994, however, Sequoyah-7 became indebted to the FmHA. Thus, the court must evaluate whether Sequoyah-7's claims arising after

September 28, 1994, including the continuation of service by Muldrow in Sequoyah-7's protected area, are actionable.

In order to evaluate Sequoyah-7's claims in this respect, the court must turn to the third element for a § 1926(b) violation - whether Muldrow has encroached upon or invaded an area to which Sequoyah-7 has "made service available." Section 1926(b) does not define the term "made service available." One approach to defining this term is to determine whether the "association" has a state law duty to provide service to the area in question. See North Alamo Water Supply Corp. v. City of San Juan, Texas, 90 F.3d 910, 916 (5th Cir.), cert. denied, 117 S.Ct. 586 (1996) (the existence of a state law duty to provide service "is the legal equivalent to"making service available under § 1926(b)); City of Sioux Center, 967 F.Supp. at 1530 (answer to question of whether a rural water district "had a legal right to serve depends entirely upon applicable state law.") Here, Sequoyah-7 cites to the Rural Water, Sewer, Gas and Solid Waste Management District Act, 82 O.S. §§ 1324.1-1324.35, §§ 1324.41-1324.50. The court has reviewed the provisions of this act and finds no duty or obligation on the part of Sequoyah-7 to provide water service. While rural water districts in Oklahoma are certainly formed in order to provide an adequate rural water supply to meet the needs of rural residents within the district's territory, state law does not mandate or require rural water districts to provide water service. Consequently, absent a legal obligation imposed under state law to provide water service to the area in question, the court must determine whether Sequoyah-7 has "made service available" under an alternative approach adopted by the federal courts which have addressed this issue.

An alternative test requires Sequoyah-7 to establish it has "made service available" by demonstrating its legal, authority to serve the disputed territory in combination with a physical ability to do so.[5] The latter part of this inquiry is commonly referred to as the "pipe-in-the-ground test." City of Sioux Center, 967 F.Supp. at 1525; Bell Arthur, 972 F.Supp. at 961; see also Lexington-South Elkhorn, 93 F.3d at 237. The key component of this test is the proximity of the facilities to the area to be served:

> [W]hether an association has made service available is determined based on the existence of facilities on, or in the proximity of, the location to be served. If an association does not already have service in existence, water lines must either be within or adjacent to the property claimed to be protected by Section 1926(b) prior to the time an allegedly encroaching association begins providing service in order to be eligible for Section 1926(b) protection.

Lexington-South Elkhorn, 93 F.3d at 237. In addition to determining whether Sequoyah-7's physical structures - pipes in the ground - are present to serve the disputed territory, the

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[5] Because the court concludes Sequoyah-7 has failed to present sufficient evidence to establish that it has made service available to the disputed territory, the court need not decide whether Muldrow's activities constitute a curtailment of Sequoyah-7's service area. Moreover, the court need not address Muldrow's arguments related to its contention that Sequoyah-7 does not have the legal authority to service the disputed territory.

court also considers whether the structure has the physical ability or capacity to meet the consumers' needs and whether fiscal constraints placed on, or by, Sequoyah-7 impede its ability to service the area. See Bell Arthur, 972 F.Supp. at 962-63 (in determining that rural water district had not made service available, the court considered the capacity of the existing structure and the fact that the rural water district did not have funds available to build the necessary additional lines).

Sequoyah-7 does not contend it has provided water service to the disputed territory in the past. Nor does it contend that it is currently providing such service. Rather, Sequoyah-7's argument is that it "has the ability to provide water service and has made water service available to all of the customers in the dispute." Affidavit of Tommy Click at ¶ 21 (Plaintiff's Exhibit No. 1 to Plaintiff's Motion for Partial Summary Judgment). Sequoyah-7's evidentiary basis for this assertion is found in the affidavit of Tommy Click, Manager of Sequoyah-7. As to the disputed territory and corresponding consumers, Click provides the following details regarding Sequoyah-7's facilities:

> Cherokee Rock Addition - Sequoyah-7 has a 2" water line constructed in 1970 that is approximately 200 feet from the Addition's connection to the Muldrow line. If this line is not sufficient to meet all needs of the Addition, Sequoyah-7 has a 6" line constructed in 1982 approximately 1320 feet from the Addition's connection which is more than sufficient to meet all the water needs of the Addition.

Food Plus/Dollar Store - Sequoyah-7 has a 2 ½" water line constructed in 1970 which runs across the south side of this property to which the customer could connect.

FWCC Trucking Office - Sequoyah-7 has a 2 ½" water line constructed in 1970 which runs approximately 400 feet south of this property to which the customer could connect.

Gunter Ridge Addition - Sequoyah-7 has a 2 ½" water line constructed in 1970 which runs across the east side of the Addition and a 2" line on the west side of the Addition to which the customers could connect.

OK Industries - Sequoyah-7 has a water line that is approximately 1 mile east of the property to which the customer could connect.

The Gold Crown Motel f/k/a Diana Motel - Sequoyah-7 has a water line that is approximately 1 mile east of the property to which the customer could connect.

J.D. Hill Truckwash - Sequoyah-7 has a 2 ½" water line approximately 200 feet to the west of the property to which the customer could connect.

J.D. Hill - Sequoyah-7 has a 2 ½" water line approximately 200 feet to the south of the property to which the customer could connect.

Doug Harvell - Sequoyah-7 has a 2 ½" water line approximately 200 feet to the south of the property to which the customer could connect.

Laster Realty Co. - Sequoyah-7 has a 2 ½" water line on the west side of the property to which the customer could connect.

Rasamy Mangboupha - Sequoyah-7 has a 2 ½" water line constructed in 1970 which runs approximately 400 feet south of this property to which the customer could connect.

Based on this information, Sequoyah-7 contends it has satisfied the § 1926(b) requirement of having "made service available" to the disputed territory.[6] The court disagrees.

The mere fact that Sequoyah-7 has facilities near or within proximity to the areas and customers in question is insufficient. In Lexington-South Elkhorn, the Sixth Circuit rejected a similar argument. The distribution lines of the rural water district in Lexington-South Elkhorn were located fifty yards from one property and ranging from .1 to .4 miles from other properties. The Sixth Circuit, in affirming the district court's determination that the rural water district, Lexington-South Elkhorn, had not made service available,

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[6] Omitted from this list is any mention of Sequoyah-7's service facilities available with respect to the Bob Prewitt Property (John Bogner) and FWCC Trucking location No. 820138. Consequently, Sequoyah-7's § 1926(b) claim as to these two properties must fail due to the absence any proof that Sequoyah-7 has "made service available."

concluded that "[b]ased on the location of Lexington-South Elkhorn's distribution lines, it had not made service available prior to the time that [the municipality] began providing service to the disputed area." Id. at 237. Similarly, the distances of Sequoyah-7's water lines to the customers in question in this case, ranging from 200 feet to 1 mile, are not within sufficient proximity to establish that Sequoyah-7 has made service available to the disputed territory. Moreover, with respect to the Food Plus/Dollar General and OK Industries facilities, Sequoyah-7's 2 ½ inch water line is insufficient to service those customers' water needs. Without the capacity to deliver water in quantities sufficient, to service these customers, it cannot be said that Sequoyah-7 has made service available. Bell Arthur, 972 F.Supp. at 962-63. Finally, in considering Sequoyah-7's argument for finding that it has made service available based on the proximity of its facilities, the court places great weight on the fact that Sequoyah-7 admittedly would require customers "to pay the cost to connect their facilities to Sequoyah-7's distribution system as provided by state law." The fact that Sequoyah-7 would require consumers, who are already being adequately serviced by Muldrow, to pay for improvements to Sequoyah-7's distribution system militates against a proximity finding in

favor of Sequoyah-7.[7] Id. Consequently, the court finds Sequoyah-7 is not entitled to protection under § 1926(b).

## CONCLUSION

The court finds Sequoyah-7 to be ineligible for § 1926(b) protection because it has failed to make service available to the disputed territory and customers. Thus, Sequoyah-7's motion for partial summary judgment is denied and Muldrow's motion for partial summary judgment is granted. Sequoyah-7's claims for § 1926 (b) protection brought pursuant to 42 U.S.C. § 1983, the Declaratory Judgment Act, 28 U.S.C. § 2201(a) and 2202, and a constructive trust theory, are hereby dismissed. This action is therefore dismissed in its entirety.

**IT IS SO ORDERED** this 12th day of June, 1998.

/s/_____
Frank H. Seay
United States District Judge

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[7] The court likewise rejects Sequoyah-7's alternate solution to the proximity issue - supply proximity by converting Muldrow's water lines to Sequoyah-7's. Sequoyah-7 relies on North Alamo Water Supply Corp. v. City of San Juan, 90 F.3d 910 (5th Cir.), cert. denied, 117 S.Ct. 586 (1996), for this proposition. The court rejects this draconian remedy and finds it is not authorized by any legal authority. Sequoyah-7 has the affirmative obligation under section 1926(b) to make service available - it may not satisfy this obligation by riding the coattails of a municipality's constructive efforts to provide water service to consumers who would otherwise be without service.

## APPENDIX 2

**Grand Jury Indictment for Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process of Law; Just Compensation for Property.**

> No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

## APPENDIX 3

**Powers Reserved to States or People.**

The powers not delegated to the United States by Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.